be allowed to stand because of an allegation of mootness.

The appellee contends that since the United States Senate has seated him, the question as to the parties is now moot. As can be seen by an examination of 132 A.L.R. 1185, the great weight of authority indicates that an appellate tribunal may retain an appeal for final determination if it involves questions of public interest, even though the specific question has become moot as to the parties concerned. *Southern Pacific Terminal co. v. Interstate Commerce Commission,* 219 U.S. 433, 31 S.Ct. 288, 55 L.Ed. 283 (1911). This article points out that courts are more inclined to retain an appeal on the ground of public interest where:

1. The question is likely to arise in the future unless settled by a court of last resort;

2. The validity of a statute is in question;

3. A final determination is necessary for the guidance of public officials;

4. There is a question involving an election.

5. It would be difficult or even impossible to get a final determination of the question because the case must necessarily become moot before the appeal can be heard. 132 A.L.R. 1189-1191.

Without commenting on each of the above criteria individually, the appellant respectfully submits that *all* are relevant to the cause pending and should be considered before the question involved is declared moot.

The last point is especially salient to this suit because of the necessity of the United States Senate to seat the declared winner so soon after the election. If appellee

Hartke's argument is accepted, the constitutionality of the recount statute could never be subject to appellate review.

Appellee Hartke sought relief in the Federal District Court to declare Indiana's recount statute unconstitutional. The Federal District Court did this. Now appellee Hartke is attempting to block any further appeal of the question. The Attorney General has a duty to defend the constitutionality of all state statutes when attacked. This question deserves appellate review. To decide otherwise, in view of the United States Senate's procedure for seating the declared winner so soon after the election, would allow the Federal District Court to be the final arbiter since further appeal would be moot because the declared winner would have been seated.

As decided in *Powell v. McCormack,* 395 U.S. 486, (1969), the supposed mootness of a "primary" claim does not require the conclusion that all "secondary" claims are likewise moot. The United States Supreme Court held Powell's claim to membership in the 90th Congress was *not* moot, notwithstanding the fact that that session of Congress had terminated and Powell had been seated in the 91st Congress before the Court could hear the case. The opinion, *Powell, supra,* at 498-499, stated that Powell had not been paid his salary, which was an unresolved and hotly-contested claim, and that declaratory relief had been requested and remained a viable issue.

Appellee Hartke obtained a lower court decision that the Indiana statute is unconstitutional. The Attorney General now asks this court to review the Federal District Court's decision without regard to any allegations of mootness as pertains to Mr. Roudebush's right to be seated in the United States Senate. The State of Indiana is entitled to a final adjudication of its recount statute; a denial of

appeal because of mootness of the question as it pertains to Mr. Roudebush deprives this State of such an adjudication.

The Appellant Sendak therefore prays that this appeal be granted and that Appellee Hartke's Motion to Dismiss the Appeal as Moot be denied.

Respectfully submitted,

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	4
Statutes Involved	4
Statement of the Case	6
Argument	
I.A. Prohibition of § 2283	8
I.B. Lack of Irreparable Injury	15
II. Recount law is constitutional	19
Conclusion	23

TABLE OF AUTHORITIES

Page

Cases

Amalgamated Clothing Workers of America v. Richman Brothers Co., 384 U.S. 511, 75 S.Ct. 452 (1955) 8, 11, 12, 14, 15, 16

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 394 U.S. 281, 90 S.Ct. 1739 (1970) 14, 15

Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 2d 377 11

Baines v. City of Danville, 377 F.2d 579 (4 Cir. 1964) 8, 9, 11

Blackburn v. Hall, 115 Ga.App. 235, 154 S.E.2d 392 (1967) 21

Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968) 13

Dembrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965) 10, 12, 14, 16, 19

Douglas v. City of Jeanette, 319 U.S. at 164, 63 S.Ct. at 881 13

Harman v. Forsevius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed. 2d 50 11

Landry v. Daley, 288 F.Supp. 200 (N.D. Ill. 1968) 13

Odegard v. Olson, 264 Minn. 439, 119 N.W.2d 717 (1963) 21

Perez v. Ledesma, 91 S.Ct. 674 (1971) 18

Powell v. McCormack, 395 U.S. 486 (1969) 3

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 433, 31 S.Ct. 288 (1911) 3

TABLE OF AUTHORITIES—Continued

Page

Cases—Continued

State ex rel Acker v. Reeves, 229 Ind. 126, 95 N.E.2d 838 (1951) 16, 21

State ex rel Batchlet v. Dekalb Circuit Court, 248 Ind. 481, 229 N.E.2d 790 (1967) 16, 21

State ex rel Beaman v. Circuit Court of Pike County, 229 Ind. 126, 95 N.E.2d 838 (1951) 16, 21

State ex rel McCormick v. Knox Superior Court, 229 Ind. 118, 95 N.E.2d 829 (1951) 22

Wickersham v. State Election Board, Okl., 357 P.2d 421 (1960) 21

Younger v. Harris, 91 S.Ct. 746 (1971) 16, 18

Statutes

28 U.S.C. § 2283 ..... 4, 8, 9, 10, 11, 12, 13, 22

Burns' (1969 Repl.) § 29-5401 5

Burns' (1969 Repl.) § 29-5414 ..... 5, 6, 20

28 U.S.C. § 1343(3) 10

42 U.S.C. § 1983 10

Constitution

Article I, Section 4 ..... 5, 19, 20

Article I, Section 5 ..... 5, 19, 20